

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

WELLS FARGO BANK, N.A., : Case No. A0700643
Plaintiff, : Judge Martin
v. :
GLORIA BYRD, et al., : MAGISTRATE'S DECISION
Defendants. :

RENDERED THIS 23rd DAY OF JULY, 2007.

This foreclosure case is before the court on plaintiff Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion for Summary Judgment. The motion was heard before the Common Pleas Magistrate on June 11, 2007, at which time the matter was taken under submission.

BACKGROUND

Defendant Gloria Byrd ("Byrd") executed a promissory note ("Note") with the WMC Mortgage Corporation in the amount of \$56,100.00 on or about February 28, 2005.¹ To further secure repayment, Gloria and Ellsworth Byrd executed and delivered to WMC Mortgage Corporation a mortgage for real property located at 6941 Gilbert Avenue, Cincinnati, Ohio 45239 ("the Property").² The mortgage was duly recorded March 14, 2005.³

Wells Fargo asserts it is the holder of the Note as well as the mortgage assignee.⁴

¹ / Compl., Ex A

² / Compl., Ex B

³ / *Id*

⁴ / Compl. at ¶¶ 2, 3.



Wells Fargo argues that Gloria Byrd defaulted on the Note.⁵ As a result of the default, Wells Fargo elected to accelerate the remaining balance.⁶ Wells Fargo demands judgment against Gloria Byrd on the Note, that its lien be adjudged a valid first lien upon the property, and that the property be sold at auction with the proceeds of the sale be applied to the satisfaction of the aforementioned Note together with all costs and fees to which it is entitled.⁷

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56(C), summary judgment may be granted when the moving party demonstrates that (1) no genuine issue of any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) when viewing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party.⁸ The moving party “bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party’s claim.”⁹ Doubts must be resolved in favor of the nonmoving party.¹⁰ A nonmovant may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue for trial.¹¹ If the moving party satisfies its initial burden, “the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond,

⁵ / Compl. at ¶3; Mot. for Summ. J, Ex. B (Aff. of Keri Selman at ¶4), Ex. C (Notice of Default and Acceleration)

⁶ / Mot. for Summ. J, Ex. B (Aff. of Keri Selman at ¶4); Ex. C (Notice of Default and Acceleration)

⁷ / Compl. at 3-4.

⁸ / *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 187.

⁹ / *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

¹⁰ / *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59.

summary judgment, if appropriate, shall be entered against the nonmoving party.”¹²

However, summary judgment must be awarded with caution.¹³

DISCUSSION

Wells Fargo is the holder of the Note as well as the mortgagee of record.¹⁴ Wells Fargo argues Gloria Byrd is in default on the Note.¹⁵ The Byrds admit Gloria Byrd executed the Note, and they also admit executing the mortgage, but they assert three affirmative defenses; 1) the plaintiff is not the real party in interest, 2) plaintiff improperly served the Byrds the notice of default, and 3) plaintiff contributed to the default through the mismanagement of the loan.¹⁶ The moving party bears the initial burden of disproving the nonmovant’s affirmative defenses in its motion for summary judgment.¹⁷ The court addresses each affirmative defense in turn.

Real Party in Interest

Civil Rule 17(A) states:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been

¹¹ / *Chaney v. Clark City Agricultural Soc’y* (1993), 90 Ohio App 3d 421, 424.

¹² / *Dresher*, 75 Ohio St.3d at 293.

¹³ / *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1, 2.

¹⁴ / *Aff. as to Real Party in Interest (Jason Whitacre, Aff.)*(Mar. 26, 2007)

¹⁵ / *Mot. for Summ. J. at 3; Aff. of Paul E. Rogers at ¶¶3, 4.*

¹⁶ / *Ans ; Mem. in Opp.*

¹⁷ / *ABN AMRO Mortgage Group, Inc v Meyers, et al.* (Feb. 11, 2005), 159 Ohio App.3d 608, 611-12 (App. 2 Dist.)

commenced in the name of the real party in interest.¹⁸

The Byrds argue Wells Fargo filed its complaint without being the holder of the Note or the assignee of the mortgage at issue.¹⁹ They argue Civil Rule 17 requires Wells Fargo to amend its complaint.²⁰ Wells Fargo argues it complied with the requirements of Civil Rule 17(A) by ratifying its position as plaintiff prior to seeking judgment by recording the mortgage assignment.²¹

A similar set of facts recently confronted the Ninth Appellate District. The court incorporates the following portion of the decision for the edification of the parties:

The issue to be determined is whether appellee was the real party in interest or not. Actions must be prosecuted in the name of the real party in interest. The real party in interest has been defined as the party who will directly be helped or harmed by the outcome of the action. The real party in interest must have a real interest in the subject matter of the litigation and not merely an interest in the outcome of the case. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24. He or she must have some interest in the subject matter of the litigation or be the person who can discharge the claim on which the suit is brought. *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240.

If a party is not the real party in interest, the party lacks standing to prosecute the action. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. However, an action will not be dismissed on this ground until a reasonable time has been allowed for the real party in interest to ratify the commencement of the action or to be either joined or substituted as a party. Civ.R. 17(A). The purpose behind Civ.R. 17 is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter." *Shealy*, 20 Ohio St.3d at 24-25.

In its motion for summary judgment, appellee argued that appellants were in default in the payment of the promissory note they issued to America's Wholesale Lender and the terms of the mortgage deed given to secure the promissory note. Appellee further asserted that it was the lawful holder of the promissory note and, therefore, had the right to

¹⁸ / Ohio Civ. Rule 17(A)(West 2007).

¹⁹ / Mem in Opp. at 1-2.

²⁰ / *Id.*

²¹ / Mot. for Summ. J. at 3-4; Pl. Resp. at 1-2.

foreclose on the mortgage. In support of its motion, appellee attached the promissory note dated July 7, 1999, from appellants to America's Wholesale Lender; the assignment of the mortgage from America's Wholesale Lender to appellee; and an affidavit from an officer of Countrywide Home Loans, Inc., d/b/a/ America's Wholesale Lender, stating the total amount due and owing from appellants as of March 14, 2005.

In their memorandum opposing appellee's motion for summary judgment, appellants argued that appellee did not have a valid assignment of their mortgage when appellee filed its complaint. Appellants also pointed out the fact that the assignment from America's Wholesale Lender to appellee had an effective date of more than five months after appellee filed its complaint for foreclosure. Appellants further argued that appellee could not legally foreclose on the mortgage in question without seeking and being granted leave of the court to file a supplemental complaint.

Although appellants argue that appellee was required to file a supplemental complaint in order to proceed with the foreclosure action, they have failed to cite any case law to support their argument. While it not this Court's job to create appellants' argument for them, this Court has been unable to find any case law to support appellants' position. However, this Court has found case law to support appellee's claim that filing the assignment with the trial court before judgment was entered was sufficient to alert the court and appellants that appellee was the real party in interest. See *Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co.*, (D.C.S.C. 1979), 515 F.Supp. 64, 84-85 (The court held that because the assignment of the cause of action took place a year before trial, that the defendant was not prejudiced by the assignment and that the assignor was effectively precluded from bringing any suit on the cause, assignee was the real party in interest to bring the suit.). See, also, *Dubuque Stone Prods. Co. v. Fred L. Gray Co.* (C.A.8, 1966), 356 F.2d 718, 723-724 (The court held that insurance agent which was not a party to the contract nevertheless was a real party in interest and could sue for premiums owing on insurance contract in view of an all inclusive assignment from insurer to agent. Assignment was not rendered invalid by having been made after the filing of the complaint because it was made before trial and defendant showed no prejudice.).

In the present matter, appellants have failed to show that they were prejudiced by the assignment. In addition, the assignment did preclude America's Wholesale Lender from bringing an action against appellants. Therefore, this Court finds that appellee was a real party in interest for purposes of filing the foreclosure action. Consequently, the trial court correctly awarded summary judgment in favor of appellee. Appellant's

first and second assignments of error are overruled.²²

The court finds the legal conclusions and rationale in *Stuart* to be highly persuasive. The court further notes the Byrds' request for this court to adopt the foreclosure policy recently implemented by the United States District Court for the Southern District of Ohio.²³ That policy requires foreclosure plaintiffs to record their assignments of mortgage prior to, or contemporary with, the filing of the complaint.²⁴ While such a prophylactic policy is highly laudable, this court's policy of requiring attorneys of foreclosure plaintiffs to file an affidavit of real party in interest remains effective in insuring only mortgagees of record obtain judgment in foreclosure cases.²⁵

Default Notice Service

Wells Fargo states the Byrds were served a Notice of Default ("Notice").²⁶ The Notice includes the amount of the Byrds' deficiency, methods to cure the default, the date by which the Byrds must cure the default, that failure to cure the default may result in acceleration and foreclosure, as well as a contact number and possible solutions for the Byrds to employ.²⁷ The notice complies with paragraph twenty-two of the mortgage. The Byrds do not deny receiving the Notice. The court therefore finds this defense to be without merit.

²² / *Bank of New York, et al. v. Stuart, et al.* (Mar. 30, 2007), Lorain No. 06CA008953, 2007-Ohio-1483 at ¶¶ 8-13.

²³ / The defendants request was made during the hearing. Counsel for the defendants provided a copy of the General Order to the court.

²⁴ / Gen. Order No. 07-03, S.D. Ohio, May 12, 2007 at § 1 2.4.

²⁵ / The Affidavit as to Real Party in Interest must aver that the plaintiff is the holder of the note and the assignee of the mortgage (including that the assignment of the mortgage has been duly recorded).

²⁶ / Mot. for Summ. J. at 4, Ex. C (Notice of Default and Acceleration); Aff. of Gloria Byrd at ¶ 6.

²⁷ / Mot. for Summ. J. at 4, Ex. C (Notice of Default and Acceleration).

Plaintiff's Default Contribution

The Byrds allege they had entered into a forbearance agreement with Countrywide following the receipt of the Notice,²⁸ but that Countrywide returned their January 2007 payment without explanation.²⁹ The Byrds have not provided a copy of the forbearance agreement to the court. Wells Fargo indicated it did not enter into any forbearance agreement with the Byrds and is unaware of any forbearance agreement.³⁰

The Byrds further claim Countrywide assessed an "optional products" charge to the loan and other charges the Byrds contest.³¹ While such a claim may provide a basis for determining the amount of the arrearage owed, it does not provide a defense to a debtor's failure to pay.

Conclusion

The court finds Wells Fargo has met its burden of proof on the default.³² The court further finds Wells Fargo met its burden of proof as to each of the Byrds' affirmative defenses. The Byrds failed to meet their 'reciprocal' burden of proving their affirmative defenses. Therefore, when viewing all the facts most strongly in the Byrds' favor, the court finds no genuine issue of material fact remains to be litigated, and that Wells Fargo is entitled to judgment as a matter of law.

²⁸ / Mem. in Opp. at 2-3; Aff. of Gloria Byrd at ¶ 4.

²⁹ / Aff. of Gloria Byrd at ¶ 5.


³⁰ / Pl. Resp. at 2.

³¹ / Mem. in Opp. at 3; Aff. of Gloria Byrd at ¶¶ 7, 8.

³² / *Bradford v Hale* (1902), 67 Ohio St. 316, syllabus, para. 1; *King v. Safford* (1869), 19 Ohio St. 587, 588; *Gaul v Olympia Fitness Center, Inc* (June 21, 1993), 88 Ohio App 3d 310, 315 (App. 8 Dist.).

DECISION

Plaintiff Wells Fargo Bank, N.A.'s motion for summary judgment is GRANTED. Judgment against defendant Gloria Byrd on the Note in the amount of \$55,572.99 plus interest at the rate of 9.875 per cent per annum from November 1, 2006, plus costs. If this decision is adopted by the Court, plaintiff shall be permitted to file its praecipe for sale and proceed consistent with the laws of this state.


MICHAEL L. BACHMAN
MAGISTRATE
COURT OF COMMON PLEAS

NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION
HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR
ATTORNEYS AS PROVIDED ABOVE.

Date: 7-24-07 Deputy Clerk: 